

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

JAMES ARTHUR BIGGINS, : C.A. No. S09C-10-010 THG
Plaintiff, : (Corrected as to C.A. No.)
v. :
MATTHEW DUTTON (Grievance Chairperson) and :
PERRY PHELPS, WARDEN, *et al.*,¹ :
Defendants. :

ORDER DENYING MOTION TO PROCEED *IN FORMA PAUPERIS*

1) Plaintiff James Arthur Biggins (“plaintiff”) has filed a complaint against Matthew Dutton and Perry Phelps and a motion to proceed *in forma pauperis*.

2) Plaintiff’s complaint shows the following. On September 12 and September 15, 2009, he cut himself on the inside of his cheek and lip while eating with a plastic fork or spork which James T. Vaughn Correctional Center (“JTV”) supplied. Plaintiff put in a sick call and was seen ten days later, allegedly after his wounds were healed. Meanwhile, on September 16, 2009, plaintiff filed a grievance. Although he acknowledged in his grievance that “neither cut is deep or nothing”, he wanted to be seen by the medical unit before his wounds healed. His grievance was deemed non-grievable. Officer Dutton, the officer dealing with the grievance, explained that the grievance office “does not give monetary damages, and you did the right thing you put in sick

¹No other persons are named. Consequently, there are no other defendants besides Matthew Dutton and Percy Phelps.

call also write Lt. Lehman in the kitchen.”

Plaintiff alleges Officer Dutton’s action constituted reckless disregard for plaintiff’s serious medical needs and “placed him at the time of the incident in ‘imminent danger’ of serious physical instant and future harm, by potential cause of infection.” He maintains Warden Phelps is also responsible under a theory of respondeat superior. Plaintiff further alleges defendants have put him “at risk of harm by providing defective eating utensils (sporks).”

Plaintiff seeks compensatory and punitive damages.

3) Plaintiff has filed a motion to proceed *in forma pauperis*. Plaintiff is statutorily barred from proceeding *in forma pauperis* unless, at the time of the filing of the complaint, he establishes he was in imminent danger of serious physical injury.

4) As this Court explained in *Biggins v. Phelps*, Del. Super., C.A. No. S08M-12-018 THG (Jan. 7, 2009), *rearg. den.* (Jan. 22, 2009), *aff’d*, 2009 WL 2055128 (Del. July 16, 2009) (TABLE),² in at least six previous cases which plaintiff filed while incarcerated, plaintiff’s pleadings have been deemed frivolous and in at least two other cases, his complaints were dismissed for failing to state a claim upon which relief may be granted.

5) In 10 *Del. C.* § 8804(f), it is provided in pertinent part as follows:

In no event shall a prisoner file a complaint or appeal of a judgment arising from a complaint brought in *forma pauperis* if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or an appeal in a federal court or constitutional or statutory court of the State that was dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon which relief may be granted unless the prisoner is under imminent danger of serious physical injury at the time that the complaint is filed. Complaints or appeals therefrom dismissed prior to the enactment of this section shall be counted for purposes of determining the number of previously dismissed

²Copies of these orders are attached hereto.

proceedings. No petition for a writ of habeas corpus or any appeal from the denial of any such petition shall be dismissed under this subsection.

6) Based on the foregoing, plaintiff is statutorily precluded from proceeding *in forma pauperis* unless he is in imminent danger of serious physical injury at the time the complaint is filed. Although plaintiff alleges that he, at some point, was in imminent danger of serious physical injury, nothing in his complaint supports a contention that healed mouth sores rendered him in imminent danger of serious physical injury at the time his complaint was filed.

7) The statute precludes granting plaintiff *in forma pauperis* status for this case. Thus, he must pay a filing fee in the amount of \$185.00 and Sheriff's costs in the amount of \$35.00 in order for this action to proceed.

NOW, THEREFORE, THIS 12TH DAY OF OCTOBER, 2009, IT IS HEREBY ORDERED AS FOLLOWS:

- 1) Plaintiff's motion to proceed *in forma pauperis* is denied.
- 2) Plaintiff must submit a filing fee in the amount of \$185.00 and \$35.00 for the Sheriff's fee. He must do so on or before **November 2, 2009**, or the action will be dismissed.

/s/ T. Henley Graves
JUDGE

cc: James Biggins
Aaron Goldstein, Esquire
Ophelia Waters, Esquire